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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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12 DIANNE SUSAN NORMAN,

13 Plaintiff,

CIV. S-04-2187-LKK PAN

14 v.

15 JO ANNE B. BARNHART,
16 Commissioner of Social
Security,

FINDINGS AND RECOMMENDATIONS

17 Defendant.
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20 On October 15, 2004, plaintiff filed a complaint seeking
21 review of a final decision of the Commissioner of Social Security
22 denying plaintiff's application for disability benefits. On
23 March 21, 2005, plaintiff was ordered to show cause in writing
24 within 11 days why this action should not be dismissed pursuant
25 to Fed. R. Civ. P. 4(m) for failure to serve process within 120
26 days after the complaint was filed, or by February 12, 2005.

1 On May 16, 2005, nearly two months after the issuance of
2 the order to show cause, plaintiff's counsel filed the following
3 response:

4 I, David M. Shore, declare:

- 5 1. I apologize to the court that this response was not
timely offered.
- 6 2. I do not know why this case was filed but not timely
served, but it is my responsibility. I have sent this
7 matter out for service by certified mail and will file
such proof of service upon receipt.
- 8 3. I know that I have had administrative difficulties in
the past and have tried to ensure that all motions are
promptly filed. For whatever reason, I have had some
9 matters filed but not served. I have taken it upon
myself to ensure that each of these matters are
10 properly served.
- 11 4. I respectfully request that the Order to Show Cause be
dismissed.

12 Nearly one more month has passed and plaintiff's counsel
13 has not filed proof of service upon defendant.

14 Absent a showing of good cause, Fed. R. Civ. P. 4(m)
15 directs the court to dismiss an action without prejudice "upon
16 motion or on its own initiative after notice to the plaintiff,"
17 if service of the summons and complaint have not been timely
18 made. "When considering a motion to dismiss a complaint for
19 untimely service, courts must determine whether good cause for
20 the delay has been shown on a case by case basis. Cartage Pac.,
21 Inc. v. Waldner (In re Waldner), 183 B.R. 879, 882 (9th Cir.
22 BAP1995). We have recognized that '[a]t a minimum, "good cause"
23 means excusable neglect.' Boudette v. Barnette, 923 F.2d 754,
24 756 (9th Cir. 1991). In Boudette, we stated that a plaintiff may
25 be required to show the following factors in order to bring the
26 excuse to the level of good cause: '(a) the party to be served

1 received actual notice of the lawsuit; (b) the defendant would
2 suffer no prejudice; and (c) plaintiff would be severely
3 prejudiced if his complaint were dismissed.' Id. (citing Hart v.
4 United States, 817 F.2d 78, 80-81 (9th Cir. 1987))." In re
5 Sheehan, 253 F.3d 507, 512 (9th Cir. 2001).

6 Plaintiff has failed to satisfy any of these factors or
7 assert any other basis demonstrating good cause for failure
8 timely to effect service upon defendant.

9 Accordingly, I recommend this action be dismissed without
10 prejudice. Fed. R. Civ. P. 4(m); see also Fed. R. Civ. P. 41(b)
11 (dismissal warranted for "failure of the plaintiff to . . .
12 comply with these rules or any order of court"); E. D. Cal. L. R.
13 11-110 ("[f]ailure of . . . a party to comply with these Rules or
14 with any order of the Court may be grounds for imposition by the
15 Court of any and all sanctions authorized by statute or Rule or
16 within the inherent power of the court").

17 These findings and recommendations are submitted to the
18 Honorable Lawrence K. Karlton, the United States District Judge
19 assigned to this case. 28 U.S.C. § 636(b)(1). Written
20 objections may be filed within ten days after being served with
21 these findings and recommendations. The document should be
22 captioned "Objections to Magistrate Judge's Findings and
23 Recommendations." The failure to file objections within the

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1 specified time may waive the right to appeal the District Court's
2 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: June 15, 2005.

4 /s/ Peter A. Nowinski

5 PETER A. NOWINSKI

6 Magistrate Judge
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